Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-255 and 85-451

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUNNYSIDE VALLEY IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

UNION GAP IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

25P

QUESTIONS PRESENTED

1. Whether, while a state water adjudication was pending in its preliminary stages, the federal district court had jurisdiction to interpret its consent decree governing distribution of water from a federal reclamation project and to give instructions to the watermaster appointed pursuant to that decree.

2. Whether the district court abused its discretion in instructing the watermaster to regulate the flow of water in the Yakima River in late 1980 and early 1981 to protect salmon eggs in the River.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545.. 11, 12, 13
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 ..... 11, 12, 13
Ickes v. *Fox*, 85 F.2d 294, aff'd, 300 U.S. 82, on remand, 137 F.2d 30, cert. denied, 320 U.S. 792.. 5, 6, 16
Jicarilla Apache Tribe v. *United States*, 601 F.2d 1116, cert. denied, 444 U.S. 995 12
Montezuma Canal Co. v. *Smithville Canal Co.*, 218 U.S. 371 17
Moore v. *Anderson*, 68 F.2d 191, cert. denied, 293 U.S. 567 16
Nevada v. *United States*, 463 U.S. 110 ..... 13, 14, 19
United States v. *Ahtanum Irrigation District*, 236 F.2d 321, cert. denied, 352 U.S. 988, after remand, 330 F.2d 897 15
United States v. *Oregon*, 657 F.2d 1009 4
United States v. *Washington:*
694 F.2d 1374 9
759 F.2d 1353, cert. denied, No. 85-164 (Nov. 18, 1985) 9, 20
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 ..... 2, 3, 12

Treaty and statutes:

Treaty of June 9, 1855, United States—Yakima Nation, 12 Stat. 951 *et seq.* 2
Art. II, 12 Stat. 952 2
Art. III, 12 Stat. 953 2

Statutes—Continued: Page

Act of Aug. 1, 1914, ch. 222, § 22, 38 Stat. 604..... 15
Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*..... 5
Wash. Rev. Code Ann. §§ 90.40.010 *et seq.* (1962).. 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-255

SUNNYSIDE VALLEY IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-451

UNION GAP IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-18)[1] is reported at 763 F.2d 1032. The prior opinions of the court of appeals (Pet. App. 19-36, 37-56)

[1] Unless otherwise noted, "Pet. App." refers to the separately bound appendix to the petition in No. 85-255.

are unreported. The orders of the district court (Pet. App. 57-63, 64-72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1985. The petition for a writ of certiorari in No. 85-255 was filed as of July 18, 1985, and the petition for a writ of certiorari in No. 85-451 was filed on September 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1855, the United States entered into a treaty with the Yakima Nation of Indians. Treaty of June 9, 1855, United States—Yakima Indians, 12 Stat. 951 *et seq.* (85-451 Pet. App. 76-87). See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel Ass'n*), 443 U.S. 658, 662 & n.2 (1979). By this Treaty, the Indians ceded their rights to millions of acres of territory, but reserved a tract of land, approximately one million acres in extent, to "be set apart * * * for the exclusive use and benefit of said * * * Indians, as an Indian reservation." Art. II, 12 Stat. 952. The Yakima River formed part of the boundary of the Reservation described in the Treaty. *Ibid.* Article III of the Treaty further reserved to the Indians "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation * * * [, and] also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory * * *." 12 Stat. 953. "During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were

crucial in obtaining the Indians assent." *Fishing Vessel Ass'n*, 443 U.S. at 676.

Current estimates are that, prior to the arrival of white settlers in the area, 500,000 anadromous fish entered the Yakima River annually. By the turn of the century, the fish runs had been reduced to approximately 10% of their former size, or approximately 50,000 fish. In recent years, the total Yakima River anadromous fish run has been approximately 5,000 fish per year. C.R. 230.[2]

b. This case concerns the spring Chinook salmon, which are so named because they migrate from the ocean into fresh water rivers in the spring. They do not spawn, however, until September and early October. This is the period of historic low flows in the spawning rivers, including the Yakima River. The fish select an area of gravel riverbed where the water is approximately 12 inches deep. The female digs out a depression in the gravel and lays her eggs there. After the male fertilizes the eggs, the female covers the eggs with gravel. These nests of eggs, identifiable by the disturbed gravel, are called redds. For the successful development of salmon eggs, the redds must be in an environment of flowing water. Apart from keeping the eggs moist, the flowing water serves several purposes: it supplies oxygen to the eggs; it prevents freezing of the eggs when the air temperature dips below 32° F during winter months; and it eventually provides transport for the fry in leaving the gravel and moving into the river. It is the genius of the spring Chinook to spawn at a period of low water so that, in a naturally flowing river system, the site selected for spawning will be supplied with sufficient water in the succeeding

---

[2] "C.R." refers to the Clerk's Record in the court of appeals.

months to permit proper development of the eggs. See Pet. App. 7-8; 11/25/80 Tr. 102-103, 105, 118-119, 122.

The Chinook salmon have been the subject of considerable litigation in the Pacific Northwest. In 1968, individual Yakima Indians and the United States filed two suits in the United States District Court for the District of Oregon against the State of Oregon and its officials, challenging that State's regulation of Indian treaty fishing on the Columbia River. The Yakima Indian Nation and the State of Washington were granted leave to intervene in those actions. In 1977, the parties signed a conservation agreement regarding all anadromous fish, including spring Chinook, spawning above Bonneville Dam. See *United States* v. *Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981). On April 30, 1980, the State of Washington applied for an injunction to restrain Yakima Indian fishing in the Yakima and Klickitat Rivers, both on and off the Reservation. The State asserted that the 1980 spring Chinook salmon runs up the Columbia River were extremely depressed and that all fish in the River were necessary for spawning escapement in order to preserve the resource. On May 5, 1980, the district court granted the injunction, finding that all the salmon from the 1980 run of spring Chinook into the Yakima River were necessary for spawning escapement. *Id.* at 1011-1012. The court of appeals affirmed. *United States* v. *Oregon*, *supra*.

2. a. At the time of the 1855 Treaty with the Yakimas, there was no irrigated agriculture in the Yakima River watershed. As early as 1859, however, some irrigation had commenced. By the turn of the century, individual irrigators and ditch companies had appropriated the entire low water flow of the

Yakima River and its tributaries in order to irrigate lands lying largely outside the Yakima Reservation. Pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*, and enabling legislation in Washington State, Wash. Rev. Code Ann. §§ 90.40.010 *et seq.* (1962), the Reclamation Service undertook to contract storage capacity in the Yakima watershed. In the period from 1909 to 1933, the Reclamation Service built six storage reservoirs. Pet. App. 6-7.

b. In 1930, toward the end of the construction period, a dispute arose over the scope of the obligation of the Bureau of Reclamation to deliver water to holders of repayment contracts under the Yakima Project. Individual irrigators brought suit against the Secretary of the Interior in the United States District Court for the District of Columbia to establish their right to receive water in an amount they previously had beneficially used on their lands, without incurring additional repayment obligations attributable to the construction of additional storage capacity. *Ickes* v. *Fox*, 85 F.2d 294 (D.C. Cir. 1936), aff'd, 300 U.S. 82 (1937), on remand, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943).

In 1939, while *Ickes* v. *Fox* was pending, the instant suit was filed by the United States and several irrigation districts in the Yakima Project against the individuals who were the plaintiffs in *Ickes* v. *Fox*, the Sunnyside Valley Irrigation District, and other irrigation districts. *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, Civ. No. 21 (E.D. Wash.). See E.R. 1-31.[3] The complaint recited the dispute, also involved in *Ickes* v. *Fox*, concerning whether those defendants and others had the right to

[3] "E.R." refers to the Excerpts of Record filed in the court of appeals.

share in Project water according to the amount specified in their contracts or in a greater amount according to past beneficial use (E.R. 8-28). The complaint sought a declaratory judgment concerning the obligation of the United States to furnish water from the Yakima Project to irrigation users under the Project and the allocation of irrigation water among Project users (E.R. 28-29). Several of the defendants subsequently filed "cross-claims," seeking joinder of all users of Yakima River water and a general adjudication of water rights in the Yakima River and its tributaries (E.R. 53-54, 66, 79-80, 83, 105-106). However, the additional parties necessary for that purpose were never joined.

In the 1943 decision in *Ickes* v. *Fox*, *supra*, the District of Columbia Circuit held that rights to Project waters were defined by beneficial use rather than the terms of the repayment contracts. That decision eliminated the basic legal issue among the parties in the present suit and "left only the matter of the respective rights of the water users within the project undetermined" (Pet. App. 78-79). In order to avoid the need for further adjudication on the latter question, the parties entered into a consent decree (Pet. App. 139-211). That decree defined the obligation of the United States to deliver water from the Project to the United States' co-plaintiffs, to the defendants, and "to the lands within the Wapato Indian Irrigation Project" on the Yakima Reservation (*id.* at 141-142). See, *e.g.*, *id.* at 144, 169-174.

c. In the years following 1945, the Bureau of Reclamation furnished irrigation water under the terms of the decree. In 1977, however, a record drought prompted several of the parties to seek further relief from the court under its retained jurisdic-

tion to administer and interpret the decree (Pet. App. 210-211). The district court appointed William G. Gray, the Yakima Project manager, as watermaster to supervise delivery of water under the decree (*id.* at 66).

The drought also prompted renewed efforts to adjudicate water rights in the Yakima watershed. For example, the Yakima Nation of Indians sought to intervene in this proceeding in 1977, but that request was denied. The Tribe also initiated a suit in federal court to establish its rights, but that action has been stayed. *Yakima Nation* v. *United States*, Civ. No. C-77-129 (E.D. Wash.). The State of Washington similarly filed an action in state court for a general adjudication of water rights in the Yakima watershed. *State Department of Ecology* v. *Acquavella*, No. 77-2-01484-5 (Yakima County, Wash., Super. Ct.). The United States, joined as a party thereto, removed that action to federal court. However, in January 1979, the *Acquavella* case was remanded by the federal court to the state court (*Washington* v. *Acquavella*, No. C-77-347 (E.D. Wash. 1979)), where it is still pending.

3. a. In the early fall of 1980, irrigation water released from the Yakima Project reservoirs created an artificially high stream flow in portions of the Yakima River. Between the confluences of the Cle Elum and Teanaway Rivers, the stream flow was approximately 1000 cubic feet per second (c.f.s.) or higher (10/29/80 Tr. 25). In early October, the Yakima Indian Nation's tribal biologist located 60 spring Chinook redds in this stretch of the river (C.R. 23). Because of the high flows, most of the redds were located at elevations in the streambed that would be uncovered when the irrigation delivery flows were terminated (10/29/80 Tr. 25-26). If the

streamflow had been sharply reduced by closing the gates to the Cle Elum Dam, the eggs would have been destroyed. Pet. App. 59-61.

In response to these events, representatives of the Yakima Indian Nation requested the watermaster to maintain the streamflow after the irrigation season had closed in order to save the redds from destruction (10/29/80 Tr. 11-12). Conferences among the Indians, the irrigators and the United States Fish and Wildlife Service failed to achieve a solution (*ibid.*). The watermaster then approached the district court for instructions. As his counsel expressed it, the watermaster requested guidance with respect to (10/29/80 Tr. 17-18):

> how he should go ahead to implement his authority and responsibilities under the 1945 decree, his responsibility to see that the waters are diverted and allocated in accordance with that decree. * * * [I]t appears implicit in his responsibility of operating the waters or the project in accordance with the 1945 decree he would also have to give consideration as to how the carryover waters and the waters in the reservoir should be established and maintained and handled to meet what he knows will be an upcoming irrigation season.

Following a hearing, the district court ordered the watermaster to maintain a streamflow of 650 c.f.s. in the River (or a lesser amount if the redds could be protected) until November 28, 1980 (Pet. App. 62).

A further hearing was held in November 1980. That hearing explored the effect of the previous order on water storage, the prospect of the need for future water releases, and methods for enhancing the survival of the redds with less waterflow. In its

supplemental instructions, dated November 28, 1980, the district court ordered the watermaster to maintain a sufficient flow of water to protect the redds (up to 650 c.f.s.) throughout the winter; other protective measures (transplantation of some eggs and construction of berms to deflect water over other redds); and a report to the court on methods of distributing water and operating the Project to avoid similar problems in the future (Pet. App. 69-72).

b. The court of appeals affirmed the district court's orders (Pet. App. 4-18).[4] The court first held that the district court, in issuing instructions to the watermaster, had properly exercised its retained jurisdiction to interpret and administer the consent decree (*id.* at 10-12) and that the district court was not required to dismiss that ancillary proceeding in favor of *Aquavella*, the pending state water adjudication

---

[4] The court of appeals' initial opinion in this case (Pet. App. 37-56) was issued on September 10, 1982. Petitioners filed for rehearing, contending that the decision below was inconsistent with the panel decision in *United States* v. *Washington (Phase II)*, 694 F.2d 1374 (9th Cir. 1982). The latter case concerned the rights of the Indians under the Treaty with the Yakimas and other treaties to a habitat for the fish that was free of degradation by the State. A petition for rehearing en banc thereafter was granted in *United States* v. *Washington, supra.* The en banc court entered a decision in that case on April 29, 1985, holding that the nature and extent of the treaty rights in this respect could not properly be addressed in a broad declaratory judgment, and must instead await a concrete controversy. See *United States* v. *Washington,* 759 F.2d 1353 (9th Cir. 1985), cert. denied, No. 85-164 (Nov. 18, 1985). The petitions for rehearing in this case had been held pending a decision on the en banc rehearing in *United States* v. *Washington, supra.* After the filing of a second set of rehearing petitions in this case, a final amended opinion (Pet. App. 4-18) was issued on June 14, 1985.

(*id.* at 13-15). The court of appeals next held that the 1945 consent decree in the instant case was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate the treaty rights of the Yakima Nation. For this reason, the court rejected petitioners' contention that the district court was barred by res judicata from taking special action to protect the fish. *Id.* at 12, 15-16.

Finally, on the merits, the court of appeals held that the district court did not abuse its discretion in issuing instructions to the watermaster in October and November 1980, in light of the emergency presented and the absence of information about alternative means of protecting the redds (*id.* at 16-17). In reaching this conclusion, the court of appeals specifically stated that it "need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty" (*id.* at 18 n.5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court below merely held that the district court did not abuse its discretion in giving instructions to the watermaster appointed to assist in the administration of a consent decree previously entered by that court. Those instructions enabled the court to address an emergency situation that threatened destruction of a substantial number of spring Chinook salmon eggs at a time when that species was so depleted that the Yakima Nation was enjoined from any harvesting. This narrow and fact-bound ruling in the administration of the consent decree does not warrant review by the Court.

1. Petitioners contend (85-255 Pet. 42-46; 85-451 Pet. 17-18) that the district court should not even have exercised jurisdiction over the controversy concerning the effect of the operation of the Yakima Project on the Chinook salmon redds in the fall of 1980. In their view, because a general adjudication of rights to the use of water in the Yakima River watershed was pending in state court, this Court's decisions in *Colorado River Water Conservation Dist.* v. *United States* (*Akin*), 424 U.S. 800 (1976), and *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), required the district court to refer the matter to the state court. This assertion is without merit.

Akin and *San Carlos Apache* involved situations in which the federal adjudication was in a preliminary stage. In this case, by contrast, the federal district court had (i) entered a consent decree in 1945 that determined the respective rights of irrigation districts, as well as lands within the Wapato Indian Irrigation Project, to receive water from the Yakima Project; (ii) retained jurisdiction to interpret and administer that decree;[5] and (iii) appointed a watermaster to assist in administration. Confronted with an emergency, the watermaster requested instructions from the court under whose authority and decree he operated. Nothing in *Akin* or *San Carlos Apache* sug-

[5] Contrary to the contention of petitioners in No. 85-255 (Pet. 38-41), because the consent decree expressly authorized the court to appoint a watermaster and to retain jurisdiction over matters relating to the "interpretation" and "administration" of the decree, the district court acted well within its authority when it issued instructions to the watermaster regarding the administration of the decree. That retained jurisdiction was not abrogated simply because the instructions specifically related to the Project's effect on the fish redds.

gests that a federal district court must decline to respond to such a request for instructions.

In addition, *Akin* and *San Carlos Apache* involved competing suits in federal and state court seeking a quantification of water rights. The dispute in this case concerned the operation of a federal reclamation project, not the quantification of water rights. Compare *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, 1135-1136 (10th Cir.), cert. denied, 444 U.S. 995 (1979) (dismissal of claim for general adjudication, but retention of jurisdiction over claim for injunction to restrain excessive diversions from water projects). The district court, in resolving this dispute, did not quantify a water right for the Yakima Indian Nation for fishery purposes. Instead, the court merely recognized that the preexisting Indian treaty fishing rights—which were confirmed by this Court in *Fishing Vessel Ass'n*—provided a relevant legal consideration in the operation of the Yakima Reclamation Project under the district court's prior consent decree.

The orders issued by the district court in 1980 also were dependent upon unique factual circumstances: first, the federal district court in Oregon had determined that all spring Chinook salmon entering the Yakima River were necessary for spawning escapement to preserve the run; and second, the jeopardy to the redds had been caused by the operation of the Yakima Project itself, because the artificially high river flows induced the salmon to spawn above the natural low flow elevation of the River. In light of these emergency conditions, the district court addressed the need for the Yakima Project to be operated to prevent destruction of the treaty-protected fish run, and it designed a remedy, through alteration

in the operation of the Project, to accomplish that end. In holding that the district court had not abused its discretion, the court of appeals expressly did not decide the scope of the Yakima Nation's treaty fishing rights (Pet. App. 18 n.5), much less the existence or extent of a reserved water right for that purpose. Its ruling therefore is entirely consistent with *Akin* and *San Carlos Apache* and implicates none of the concerns favoring deferral to state proceedings that were identified in those decisions.

2. Petitioners also contend (85-255 Pet. 32-37, 46-51; 85-451 Pet. 18-27) that the court of appeals erred in holding that the doctrine of res judicata, as applied to the 1945 consent decree, did not bar the district court from considering the effect of the operation of the Yakima Project on the spring Chinook salmon. In petitioners' view, this holding is contrary to the decision in *Nevada* v. *United States*, 463 U.S. 110 (1983). Petitioners concede (85-255 Pet. 48; 85-451 Pet. 24) that the litigation that led to the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin; but they nevertheless seek to bind the United States and the Yakima Indian Nation as if it were such a general adjudication. As we explain below, petitioners' characterization of the litigation below is incorrect, and the court of appeals' decision is fully consistent with *Nevada* v. *United States*, *supra*.

In *Nevada* v. *United States*, *supra*, the United States and the Pyramid Lake Paiute Tribe instituted an action to establish rights to water from the Truckee River to benefit the fish in Pyramid Lake on the Pyramid Lake Indian Reservation. This Court held that under the doctrine of res judicata, the consent decree in a previous case, *United States* v. *Orr*

Water Ditch Co., Equity No. 3 (D. Nev.), barred the assertion of further reserved rights to Truckee River water on behalf of the Tribe. 463 U.S. at 145. The *Orr Ditch* litigation had been commenced in 1913 to quiet the title of all claimants to water from the Truckee River watershed, including the Indians of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project. Consistent with this broad scope of *Orr Ditch*, the United States brought that action both on its own behalf and on behalf of the Reservation Indians. 463 U.S. 116, 118, 135, 138, 140. In finding the government's subsequent action barred by res judicata, the Court specifically stated that the purpose of the *Orr Ditch* litigation and decree was to settle the rights of all claimants to water from the Truckee River (463 U.S. at at 131-133) and that the government had been given a fair opportunity—and had taken that opportunity—to litigate the Reservation's entire right to such water (*ibid.*). In those circumstances, the Court held that the government's attempt to claim additional rights on behalf of the Tribe presented the same cause of action as the government had asserted in *Orr Ditch*. Relitigation therefore was barred under the doctrine of res judicata. 463 U.S. at 130-144.

The circumstances leading to the 1945 consent decree in the instant case were quite different from those involved in *Orr Ditch*. This case was initiated to determine the obligations of the United States in the distribution of water from the Yakima Reclamation Project to water users who held repayment contracts and the respective rights under the Project of the irrigation districts and the lands within the Wapato Indian Irrigation Project. It was not commenced to determine the rights of the Yakima Reclamation

Project as a whole as against all other claimants to the waters of the Yakima watershed.[6]

Consistent with this limited purpose, the original complaint named as parties only those entities and individuals who held contracts for water service from the Yakima Project (E.R. 14.), and the principal relief requested was a declaration whether the obligation of the United States to deliver Yakima Project water was defined by the amounts of water specified in individual contracts or by some other principle (such as past beneficial use). E.R. 28-29.[7] If a prin-

---

[6] In contrast to the case of the Newlands Reclamation Project and the Truckee River, the government did not initiate a suit to quiet title to the waters of the Yakima River in connection with its commencement of the Yakima Reclamation Project. Instead, many then-existing water users executed limiting agreements, and the Secretary of the Interior limited the Yakima Indians' claim to the low-water flow of the Yakima River mainstem to 147 c.f.s. Congress subsequently repudiated the 147 c.f.s. limitation and ordered the Bureau of Reclamation to provide at least 720 c.f.s. to the lands of the Yakima Indian Reservation. Act of Aug. 1, 1914, ch. 222, § 22, 38 Stat. 604. A similar limiting agreement concerning the Indians' rights to waters in Ahtanum Creek, a boundary water of the Yakima Reservation, was construed by the Ninth Circuit in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (1956), cert. denied, 352 U.S. 988 (1957), after remand, 330 F.2d 897 (1964). The Ninth Circuit there concluded that the agreement was a recognition of the non-Indians' subordinate water rights during the historic irrigation season and that the Indians' reserved rights to water from Ahtanum Creek were unimpaired at all other times. 330 F.2d at 915.

[7] The dispute underlying this litigation arose because the Reclamation Service had, in the years preceding 1930, delivered water to some lands served by the Project in excess of the amounts specified in the repayment contracts. In the early 1930's, the Secretary of the Interior attempted to require

ciple of limitation other than one based on the amounts specified in the contracts was to be chosen, the complaint requested a declaration concerning how water was to be allocated among the competing water users—in view of the practical reality that there might not be enough water available for the Project as a whole to satisfy that greater demand. It was only in this sense that the complaint requested a declaration of the rights among the parties (*id.* at 29).[8]

---

those users to sign additional contracts for the excess water. Individual water users filed suit—first in the Eastern District of Washington (*Moore* v. *Anderson*, 68 F.2d 191 (9th Cir. 1933), cert. denied, 293 U.S. 567 (1934)), and then in the District of Columbia. *Ickes* v. *Fox*, *supra*.

[8] The petitioners in No. 85-255 rely (Pet. 49) on a selective quotation from Paragraph 18 of the United States' complaint for the proposition that the United States intended to put in issue all of the water rights in the Yakima Basin, including those of the Yakima Nation. Petitioners quote the portion of Paragraph 18 that states that "the * * * water rights of *said plaintiffs* and all of the defendants herein and of all of the parties having rights to receive water from the Yakima Project are * * * inter-related and inter-dependent" (E.R. 15 (emphasis added)). Petitioners fail to quote the opening sentence of Paragraph 18, which states: "All of defendants herein and plaintiffs *other than the United States* have contracts with the United States for specified amounts or proportionate shares of the water supply made available by the * * * Yakima Project, and *said plaintiffs* and all of defendants are dependent in whole or in part" on works constructed by the United States in connection with the Yakima Project (E.R. 14 (emphasis added)). The "said plaintiffs" in the sentence quoted by petitioners therefore obviously refers to the plaintiffs *other than* the United States who have contracts *with* the United States for the delivery of water from the Yakima Project. For this reason, Paragraph 18 plainly does not embrace any rights of the United States outside of the context of the Yakima Project.

The consent decree entered in 1945 effectuated the purpose of the complaint filed by the United States. The decree sets out schedules of the amounts of water to be delivered from the Project to each irrigation district and the lands of the Wapato Indian Irrigation Project[9] on a monthly basis during the irrigation season (Paras. 3-16, *reprinted at* Pet. App. 142-200), provides for an allocation system in times of shortage (Paras. 18, 19, *reprinted at* Pet. App. 201-209), and states that the "rights of any claimants to water of the Yakima River who are not parties to this cause shall in no way be prejudiced or affected by this judgment" (Para. 20, *reprinted at* Pet. App. 210). In sum, the litigation, as designed and concluded, settled only the rights among the users of Yakima Project water and the obligations of the United States to deliver the water available to the Yakima Project. The decree therefore was res judicata only with respect to those competing demands of irrigation districts and others to waters of the Yakima Project (compare *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U.S. 371 (1910), upon which petitioners rely (85-255 Pet. 48; 85-451 Pet. 25)), not with respect to the aggregate rights of the Project as against all other users of Yakima River water, including any requirements for fishery purposes.

In contrast to *Orr Ditch*, then, the United States did not intend in the *Kittitas* litigation to take advantage of an opportunity to litigate the rights of the Yakima Indian Nation to water from the Yakima

---

[9] The Wapato Indian Irrigation Project is operated by the Bureau of Indian Affairs and serves allotted lands within the Yakima Reservation. References to "Indian rights" cited by petitioner Sunnyside (85-255 Pet. 36) refer to this BIA project and not to the Yakima Indian Nation.

River. When the cross-claims were filed asking for joinder of additional parties and a general adjudication, the United States filed a motion to dismiss. Had *Kittitas* been expanded into a general adjudication, the Indians' *Winters* rights—as well as all reserved rights claimed by any other agency of the United States—presumably would have been put in issue. But the additional parties necessary to such a general adjudication were never joined, and that broad adjudication was never accomplished.[10]

In any event, the issue in this case is whether the 1945 decree was intended to require the operation of the Yakima Project in a way that destroyed fish life. At the very least, the decree was not intended to have that drastic result. This much is clear from Paragraph 17 of the decree. That paragraph provides for distribution to the irrigator parties of flood water in

---

[10] This context is confirmed by a letter discussed in the government's response to petitioners' petition for rehearing in the court of appeals. In recommending dismissal of the cross-claims, government counsel noted the radical and burdensome expansion of the suit threatened by the cross-complaint:

> "The cross-complaint threatens a general adjudication which we definitely do not want and definitely is not within the scope of the complaint. We think that we can now with justification ask for the dismissal of this case without prejudice on the grounds * * * that it is wholly unnecessary, will subject the water users to unwarranted expense and is not the purpose of our original action. We might also consider pointing out to the court that if this action should result in a general adjudication of the Yakima, the Indians' rights under the Winter's doctrine would also be involved."

Response of U.S. to Renewed Petitions for Rehearing with Sugestion of En Banc Consideration 8, quoting letter from District Counsel to Commissioner, Bureau of Reclamation at 4 (Nov. 28, 1941).

excess of the amount to which those parties are entitled under the decree. Flood water is deemed to be available for this purpose when the Yakima Project supervisor determines that "there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for *proper river regulation, including in said amount the amount necessary to protect fish life in the river below said dam*" (Pet. App. 200-201 (emphasis added)). The emphasized phrase manifests an intent to "protect fish life," and indeed deems that purpose an aspect of "proper river regulation." That is the principle recognized and applied by the district court and court of appeals.

We note as well that petitioners do not contend that the regulation of the Project and the River in late 1980 and early 1981, pursuant to the two instructions to the watermaster, affected the amount of water stored upstream to such an extent that the amount of water actually received by irrigators in 1981 was reduced below that to which they were entitled under the 1945 decree. If the irrigators' requirements were met, they have no cause to complain about the manner in which the Project was operated. Thus, unlike in *Nevada* v. *United States*, *supra*, where the United States and the Tribe asserted an actual reserved right to a quantity of Truckee River water that necessarily would have been recognized at the expense of irrigation uses, the operation of the Yakima Project in a manner that prevents destruction of treaty-protected fish does not necessarily infringe upon or conflict with irrigation uses.

Finally, as we have explained, the nature and extent of the Yakima Nation's fishing rights under the 1855 Treaty, as against other activities that affect the River, were not determined in this case (see Pet.

App. 18 n.5). The Ninth Circuit's recent decision in *United States* v. *Washington*, *supra* (discussed at note 4, *supra*), in fact makes clear that the court of appeals will proceed cautiously and on a case-by-case basis in exploring that issue. Nor does the court of appeals' decision recognize a reserved water right, as such, for the benefit of treaty-protected fishing rights. Cf. Pet. App. 48, 55 n.5. The adjudication and quantification of any such water right, along with all rights to water in the Yakima River Basin, will occur in the *Acquavella* litigation, which is pending in state court. Only when that litigation is completed will the respective rights of all concerned be known. There accordingly is no occasion for review by this Court of the resolution by the courts below of the episode concerning the Chinook salmon redds that occurred five years ago.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

NOVEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20052